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In the
Supreme Court of the United States
OCTOBER TERM, 1943

No. 350

On Writ of Certiorari to the Supreme Court of the State of Oklahoma

PUBLIC SERVICE COMPANY OF OKLAHOMA, a Corporation,
Petitioner,

vs.

JOE T. PARKINSON, County Treasurer of Tulsa County, Oklahoma,
Respondent.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF

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Oklahoma City, Oklahoma,
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September, 1943.

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In the
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No.

PUBLIC SERVICE COMPANY OF OKLAHOMA, a Corporation,
Petitioner,

vs.

JOE T. PARKINSON, County Treasurer of
Tulsa County, Oklahoma,
Respondent.

**PETITION FOR WRIT OF CERTIORARI
TO BE DIRECTED TO THE
SUPREME COURT OF THE STATE OF OKLAHOMA**

To the Honorable Harlan Fiske Stone, Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner, above named, respectfully shows:

I. SUMMARY STATEMENT OF THE MATTER INVOLVED

Petitioner, an Oklahoma public service corporation, on December 9, 1938, filed its petition in cause No. 66621 in the District Court of Tulsa County, Oklahoma, to recover $8,088.71, which it had paid to respondent, under protest. Such

suit was authorized by Section 7, Subd. B, Art. 1, Chap 107, Session Laws of Okla. 1915 (Sec. 12665, Okla. Stat. 1931; repealed in 1941, but see 1941 Act in exactly the same language, 68 Okla. Stat. 1941, Sec. 15.50). Said sum was shown on respondent's tax books as due from petitioner for 1938 taxes for sinking funds of four school districts which had been disorganized prior to 1938 (see petition, R. 2-7). Petitioner sought to recover said sum on two grounds, namely:

(1) That none of its property in the area of any of said former districts on January 1, 1938, had been separately valued or assessed as having 1938 taxable situs therein by the State Board of Equalization, which has exclusive authority, under Sec. 21, Article 10, Oklahoma Constitution, to assess property of public service corporations;

(2) That the 1938 rates of levy appearing on the tax books for each of said four districts are void because the County Excise Board computed said rates without reference to a lawfully determined *total* of 1938 assessed valuations of all property present in any of said former districts on the assessment date.

Before said suit was filed, Texas-Empire Pipe Line Co., and others, protested the same four rates of levy, complaining that each was void for the same reason as set forth in (2) above. Petitioner was not a party to said proceeding, but it was a class action for the benefit of all similarly situated. It was filed in the Court of Tax Review of the State of Oklahoma, which, under 68 Okla. Stat. 1941, Secs. 331-341, has exclusive jurisdiction over complaints against tax levies on alleged grounds of illegality, either in whole or in part. Said court dismissed said protest for lack of jurisdiction to

consider said ground of complaint. On appeal, the Supreme Court of the State of Oklahoma affirmed, and expressly approved the dismissal on the said ground. *Texas-Empire Pipe Line Co. et al.* v. *Tulsa County Excise Board* (No. 29210), 187 Okla. 591, 104 Pac. (2d) 441. A complete copy of said opinion appears as Appendix "A" hereto.

On June 20, 1941, after said appeal cause No. 29210 was finally decided, petitioner filed its First Amended Petition (R. 7-21), pleading and attaching a certified copy of the mandate and opinion entered in said appeal cause.

The appellate court's decision in that case turned entirely on the court's statement, which reads:

> "We find that the question before this court is not one pertaining to an illegal levy, but is one of an alleged illegal application of the levy."

After making that statement, and stating that the Court of Tax Review has no authority to consider such a question, the court cites prior decisions wherein it had determined that complaints against illegal application of tax levies to specific properties were properly determinable in proceedings authorized by the statute, *supra,* under which petitioner brought this action. *Missouri, K. & T. Ry. Co.* v. *Cowden,* 184 Okla. 260, 86 Pac. (2d) 776, and other cases. Said statute provides that, in cases where no other remedy is provided, an aggrieved taxpayer may pay the tax under protest and, within thirty days thereafter, sue the collecting officer for recovery thereof.

The background of the controversy may be summarized as follows:

(a) According to public records, in 1926 School Districts 4, 12 and 28 of Tulsa County were disorganized and their areas were annexed to School District No. 22 (the Tulsa City District), and in 1933 Consolidated School District No. 1 of Tulsa County was disorganized and its area was annexed to said District 22;

(b) 1926 and 1933, respectively, were the last years, prior to 1938, in which separate sinking fund levies were made to provide for debts contracted prior to the annexations; in each intervening year District 22 made a single sinking fund levy to provide for (1) said debts, and (2) all debts which it, itself, had contracted both prior to, and subsequent to, said annexations (See statement by defendant's counsel at the trial, R. 27, and see fifth grammatical paragraph of the Oklahoma Supreme Court's opinion in the Texas-Empire Pipe Line Company case—Appendix "A" hereto);

(c) In the years between the dates of said annexations and 1938, no property within District 22 was separately valued and assessed as having taxable situs within any of the said four annexed areas (See defendant's counsel's statement at the trial, R. 27-28);

(d) In November, 1937, the Oklahoma Supreme Court finally decided *M. K. T. R. Co.* v. *Excise Board of Bryan County*, 181 Okla. 229, 73 Pac. (2d) 173. Therein it was held that separate levies should be made, annually, on property within the areas of disorganized school districts to provide sinking funds for debts contracted prior to disorganization.

(e) In rendering properties for 1938 assessments, *all* public service corporations owning property within said District 22 rendered them in the same manner as in each of the years between said annexations and January 1, 1938. Said renditions were accepted and the properties of *all* public service corporations were *so* assessed by the State Board of Equalization. Said board certified all such assessments to the Tulsa County assessor, accordingly (Testimony of Dan Rowe, county assessor, R. 35);

(f) On July 27, 1938, the county assessor delivered to the county excise board a document entitled: "Assessor's Report to Excise Board 1938 Showing an Abstract of All Valuations of Taxable Property in Each School District, Township and City in Tulsa County" (R. 66-67; record of offer not printed—offer shown at page 109 of the typewritten transcript). Said abstract was required by Section 9, Chapter 115, Session Laws of Oklahoma 1933 (Repealed 1941, but see 68 Okla. Stat. 1941, Sec. 15.54, embodying substantially the same provisions). In said abstract none of said disorganized districts are mentioned.

(g) On August 2, 1938, at the county excise board's request (see defendant's counsel's statement at R. 28 and see 7th grammatical paragraph of opinion in cause No. 29210 in Appendix "A" hereto), the county assessor delivered to said board another document (Pleaded at R. 11, admitted in paragraph 2 of answer at R. 22), which reads as follows:

"To the Honorable Excise Board:

"We submit to you the following valuations, located in old School Districts Number 28, Number 12, Number C-1 and Number 4, all now in School District Number 22.

"Number 12

	Real Estate	$898,905
	Personal	35,855
	Corporation	50,350
26—	Public Service	335,473
		$ 1,320,583

"Number 4

	Real Estate	$4,345,710
	Personal	36,610
	Corporation	1,270
26—	Public Service	118,684
		$ 4,502,274

"Number 28

	Real Estate	$ 948,493
	Personal	49,990
	Corporation	482,890
26—	Public Service	2,590,051
		$ 4,071,424

"Number C-1

	Real Estate	762,252
	Personal	16,000
	Corporation	115,750
33—	Public Service	339,969
		$ 1,233,971

"This the 2nd day of August, 1938.

(Signed) "Dan A. Rowe,
"County Assessor.

(Signed) "Andy Stokes,
County Clerk."

"(Seal)

The excise board then fixed rates of levy for sinking fund needs of said four disorganized districts, using, as the very groundwork for its computations, the valuations shown in the last-mentioned document, and certified same to the county assessor, who then entered said rates on the tax rolls as a charge against property therein shown as liable therefor (See paragraph 14, R. 12, and stipulation admitting the material allegations thereof, R. 38).

To show any public service corporation property as liable for said rates, the assessor resorted to copying, on the 1938 tax rolls of three of said disorganized districts, the 1926 assessed valuations of such property as fixed by the State Board of Equalization. That is, in most cases (See *1 below), he showed that owners of such property in the areas of said three districts on January 1, 1938, were liable for 1938 taxes computed by applying said rates to a sum equal to the assessed valuations of such property which the same corporations owned therein on February 1, 1926 (See *2 below). As to such property within the area of Disorganized District Con. 1, he followed the same plan by copying the assessed valuations of property therein on February 1, 1933 (See *2 below). See assessor's testimony at R. 48-49.

The trial court rendered a general judgment in favor of respondent (Journal Entry of Judgment, R. 78). On appeal

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(*1) See statement on page 10 hereof as to different method followed in setting valuation on petitioner's property in area of Disorganized District 28.

(*2) March 7, 1933, assessment date was changed to January 1. Sec. 1, Ch. 104, Session Laws 1933, Am. Sec. 7338, R. L. 1910 (Sec. 12669, Okla. Stat. 1931).

the Supreme Court of the State of Oklahoma affirmed (R. 81, *et seq.*). For convenience, a copy of said opinion is attached hereto as Appendix "B."

In said opinion, disposing of the contention that the rates were illegal because they were computed without reference to *total* legally assessed valuations, the appellate court used ten words, reading as follows:

> "The legality of the rate of
> levy has been established."

As authority for that treatment of said issue, the Court cites its decision in *Texas-Empire Pipe Line Co. et al.* v. *Tulsa County Excise Board, supra,* by which, as aforesaid, the court did not pass on said ground of complaint, but affirmed the Court of Tax Review's dismissal of the proceeding on the express ground that said court lacked jurisdiction to consider such ground.

To facilitate presentation of a reasonably short statement as to what the record shows with reference to the first-mentioned phase or ground of petitioner's complaint, namely, that its property was never lawfully assessed as having 1938 taxable situs within the areas of any of said four disorganized districts, in the attached copy of the opinion in this case (Appendix "B"), certain matter has been italicized. When read consecutively, the italicized portions disclose the basis for the affirmance of the trial court's judgment on that phase of the case.

At this point, however, it is deemed necessary to quote briefly from said opinion as follows:

"* * * We agree that the county assessor is without power to make a record contrary to the action of the assessing board, or that he has discretionary powers of assessment in such a case as this.

"The record made by him in this case, however, is not shown to be in conflict with the action of the state board. This appeal record contains no proof that the assessing board *affirmatively* fixed the taxing situs of this property *other than* as reflected by the final tax rolls as made to appear by the proper officer, the county assessor.

"These final tax rolls did reflect a further segregation of the total valuations beyond that shown by the State Auditor's certificate, but it does not result in direct conflict therewith."

The "State Auditor's Certificate," referred to in said opinion, is endorsed on the first page of the two-page "Summary of Assessment" (R. 65, received in evidence R. 36). It seems that the court's references to the "State Auditor's Certificate" are directed to the said "Summary of Assessment," which, along with the detailed assessment list thereto attached, is authenticated by said certificate.

Concerning said two-page summary, the county assessor testified (R. 35-36) that they are the first two pages of the "certified assessment" of petitioner's property as of January 1, 1938, and that said two pages constitute a complete summary of the 1938 assessment of petitioner's property as transmitted to him by the State Board of Equalization, and that thereon all of the school districts mentioned in the return, itself, are reflected.

On cross-examination of petitioner's witness Markley, who was then holding in his hands, and examining, peti-

tioner's 1938 return and the State Board of Equalization's certified assessment of the properties therein listed, defendant's counsel elicited testimony that it is impossible to determine, from data appearing on the face of said document, that any particular portions of the listed properties were located within any of said four areas annexed to District 22. Counsel inquired if segregation of the listed properties to the said areas within District 22 might be accomplished by mathematical calculations applied to data appearing on the face of the return and assessment. Witness answered in the negative. Counsel then asked if such result might be obtained by employing engineering data and mathematical calculations if the locations of particular properties were known. Witness answered: "Yes, you would have to get your old district boundaries, and then go out and count a lot of poles and wire and a lot of meters and transmitters" (R. 58).

In petitioner's case, as to its property in Disorganized District 28, said assessor entered on the 1938 tax rolls, as the taxable valuation of petitioner's property, the sum of (a) $25,473, the 1926 assessed valuation of property which petitioner owned in said district on February 1, 1926, and (b), $1,923,313, the 1926 assessed valuation of property therein on February 1, 1926, which was then owned, rendered for assessment by, and assessed to, Oklahoma Power Company, *a different corporation,* which, in the intervening years, had sold its property in said district to petitioner (See R. 62-63). He applied said rates to said sum and extended the result on the tax rolls, thereby showing that petitioner owed

$7,750.71 of the sum here in controversy, as 1938 taxes for the sinking fund of Disorganized District No. 28 (See paragraph 19 of First Amended Petition at R. 14, and see stipulation admitting the allegations thereof as true at R. 44; also, see testimony of petitioner's witness, Markley, R. 53-55).

In his opening statement, defendant's counsel conceded that the valuations used in computing petitioner's taxes were not correct (R. 29). Counsel advised the court that several lawsuits, similar to this one, had been filed against respondent by other taxpayers to recover payments which they had made, under protest, as a result of said rates of levy and the very procedure of which petitioner complains. Counsel said that each of those cases had been disposed of on one of two bases, namely:

> (1) Where taxpayer conceded that it had property on January 1, 1938, within the area of one or more of said disorganized districts and that the assessed valuation of property within each such area had been fixed by the State Board of Equalization at a sum in excess of the valuation shown on the tax rolls, the cases were dismissed;
>
> (2) Where taxpayer conceded that it had property on January 1, 1938, within the area of one or more of said disorganized districts, and respondent conceded that such property in each such district had been assessed by the State Board of Equalization at a valuation less than the valuation shown on the tax rolls, the tax had been reduced (R. 29-30).

Counsel's statement forcibly demonstrates that the tax rates are void because they were computed without reference to the *total* legally assessed valuation of property within

the respective areas. For those suitors whose taxes were reduced, the rates used were lower than would have been levied if their properties, for rate-determining purposes, had been valued as low as they were valued for the purpose of computing the reduced taxes. The procedure resulted in rates discriminatory as favoring such suitors and, therefore, said rates are discriminatory, as prejudicing every other taxpayer in the affected areas.

The contents of the record summarized in the six last-preceding paragraphs, were ignored completely by the trial court, and by the appellate court. The appellate court could not have arrived at the conclusion that the acts of the county assessor are not shown, by the record, to be in conflict with the actions of the state board if it had given consideration to the portions of the record which have just been discussed. It had no authority to ignore those matters, under its own controlling decisions. *Smith* v. *Graham,* 123 Okla. 258, 253 Pac. 55. See *Beyer* v. *Le Fevre,* 186 U. S. 114, 46 L. ed. 1080.

Because of that treatment of the record on said issue, the judgment denying relief thereon is based upon non-federal grounds which are not substantial, but which are treated as authorizing disposition of the case without considering the Federal constitutional questions raised in the trial court, and in the appellate court, and the petitioner's rights guaranteed by the Fourteenth Amendment to the Federal Constitution were violated thereby.

The whole record is before the Court in this proceeding. Petitioner says that the record shows this to be a proper case for the exercise of this Court's authority to review the evidence and order judgment entered in accordance therewith. *Ward et al., Petitioners,* v. *Board of County Commissioners of Love County, Oklahoma,* 253 U. S. 17, 64 L. ed. 751; *Ancient Egyptian Arabic Order of Nobles of the Mystic Shrine* v. *Michaux,* 279 U. S. 737, 73 L. ed. 931.

II. JURISDICTION

Pursuant to this Court's Rule 38, paragraph 2, petitioner submits, as required by this Court's Rule 12, paragraph 1, the following statements as disclosing the basis upon which this Court's jurisdiction is invoked to review, by certiorari, the judgment rendered by the Supreme Court of the State of Oklahoma in cause No. 30852 appearing on that Court's docket affirming, on appeal, the judgment of the District Court of Tulsa County denying petitioner any relief and assessing costs against petitioner in cause No. 66621 appearing on the docket of said trial court.

1. The statutory provision believed to sustain said jurisdiction is Section 344 (b) of Title 28 of the United States Code (Judicial Code, Sec. 237, amended), 28 U. S. C. A., Sec. 344 (b), 43 Stat. L. 937, which provides that it shall be competent for this Court to so review a final judgment which has been rendered by the highest court of a state in which a decision can be had, in any case where is drawn in question the validity of a statute of any state on the ground of its

being repugnant to the Constitution of the United States, or in which any title, right, privilege or immunity is specially set up or claimed by any party under the Constitution of the United States.

2. In this case, there is drawn in question the validity of the ordinances, levying the taxes complained of, on the ground that they are repugnant to the Federal Constitution. Such an ordinance is a "Statute of a State" within the meaning of that term as used in said code provision.

Determination of the validity of ordinances enacted by legislative bodies of political subdivisions of a state is within this Court's jurisdiction under said code provision. *Zucht* v. *King*, 260 U. S. 174, 67 L. ed. 194.

The contents of said tax-levying ordinances are stated only in substance in the record. They are not published; they consist of orders of the county excise board fixing rates pursuant to written estimates of needs transmitted to said board by the governing board of the taxing units. Such have been held to be "ordinances levying taxes" within the meaning of Section 19, Article 10, Oklahoma Constitution. *St. L.-S. F. Ry. Co.* v. *Tate*, 35 Okla. 563, 130 Pac. 941. In paragraph 14 of its First Amended Petition (R. 12) petitioner alleged that the county excise board fixed the rates pursuant to estimate of needs and order levying the taxes which had been prepared by and submitted to it by the governing board of School District No. 22, fixing said rates by giving consideration to a document prepared by the county assessor without authority (see paragraphs 11, 12, 13, 14, 17, R. 11-13),

and not with reference to an abstract of 1938 assessed valuations as required by law.

This Court's jurisdiction to so review said judgment under said code provision is invoked on the further ground that petitioner "specially set up and claimed" violation of its rights, privileges and immunity under the Fourteenth Amendment to the Federal Constitution on June 20, 1941, when it filed its First Amended Petition (R. 7-21), and particularly numbered paragraphs 7, 10, 11, 12, 13, 14, 16, 17, 18, 20 and 23 thereof. In said paragraph 20 (R. 15) petitioner alleges that the acts of the county assessor, complained of, were performed without petitioner's consent or knowledge, without notice to petitioner and without affording petitioner an opportunity for hearing. In said paragraph 23 (R. 16), petitioner specifically pleads that, by the procedure followed in making the levies, and in entering certain sums as ~~that~~ the taxable valuation of its properties within said disorganized districts for their 1938 tax purposes, and in enforcing the said tax-levying ordinances, the taxing officials took petitioner's property without due process of law, and denied petitioner equal protection of the law, in violation of said Fourteenth Amendment. Those allegations are believed to sufficiently state a federal question. *Bell's Gap R. Co.* v. *Pennsylvania,* 134 U. S. 232, 33 L. ed. 892; *Bellingham Bay & B. C. R. Co.* v. *New Whatcom,* 172 U. S. 314, 43 L. ed. 460. Said pleas were made at a proper time to invoke the court's jurisdiction to consider them. *Protest of C. R. I. & P. Ry. Co.,* 151 Okla. 129, 2 Pac. (2d) 935.

3. The case was tried in Tulsa County District Court without intervention of a jury. General judgment in favor of the respondent and assessing costs against petitioner was pronounced June 26, 1941 (minutes, R. 24; J. E. of Judgment, R. 78). Motion for new trial was filed within time permitted by statute; it included complaint that the judgment was erroneous on grounds (2) that it is not sustained by any evidence; (3) that it is contrary to all the evidence; (4) that it is contrary to law; (6) that it is unauthorized by law. Said motion was overruled November 8, 1941, and notice of intention to appeal to the Supreme Court of the State of Oklahoma was given the same day in open court (R. 79).

Petition in error attached to case-made, comprising all the papers and record of proceedings in the trial court, was filed in the Supreme Court of the State of Oklahoma within the time permitted by law (R. 1, *et seq.*). In said petition in error, petitioner complained of the trial court's judgment, specifying that it was erroneous because (2) it is not supported by any evidence; (3) it is contrary to all the evidence; (4) it is contrary to law; (5) it is unauthorized by law (R. 1).

That the federal questions, herein asserted, were presented to, decided by, and were necessary to the decision of, the appellate court, is shown by "Order of the Court and Certificate of the Chief Justice to Aid the Record" (R. 90) and journal entry thereof (July 29, 1943), appearing on the court's docket (see page 3 of the typewritten transcript; not in printed record). Such showing, together with the plead-

ings cited, are believed to sufficiently make the record disclose this Court's jurisdiction. *Consolidated Turnpike Co.* v. *Norfolk & Ocean View Ry. Co.*, 228 U. S. 596, 57 L. ed. 982; *Marvin* v. *Trout*, 199 U. S. 212, 50 L. ed. 157.

The Supreme Court of the State of Oklahoma is the highest state court in which a decision of the controversy can be had.

The appellate court's judgment, affirming the trial court's denial of any relief to petitioner, is found at record 86 at the end of the opinion (R. 82-86). Journal entry making it part of the record February 2, 1943, appears on the Court's docket sheet (typewritten transcript, p. 3; not in printed record).

Said judgment was announced and filed on February 2, 1943. Petition for rehearing was denied by order entered June 15, 1943 (R. 86), and said decision thereby became final.

On June 22, 1943, on application of petitioner (R. 86), which was filed within the time allowed by the court's rules with professional statement of its counsel attached thereto, the court entered its order (R. 88) staying issuance of mandate for three months, to enable petitioner to apply to this Court for writ of certiorari to review said judgment. Said order was conditioned on petitioner's giving bond for security for costs to be approved by the Chief Justice of said Court. Said bond was approved and filed on July 1, 1943 (R. 89).

A complete transcript of the record of proceedings in the trial court and in the Supreme Court of the State of Oklahoma is filed herewith.

4. The case has been rather fully stated in the foregoing "Summary Statement of the Matter Involved." That portion of this petition, and the cases there cited, are adopted here as showing that the nature of the case and the rulings of the court on the federal questions involved were such as to bring the case within the jurisdictional provisions relied on. In addition, reference is made to Proposition 2 included in the "Argument" in the attached brief supporting this petition, and the cases there cited are hereby referred to as sustaining petitioner's contention that this Court has jurisdiction to review the judgment complained of.

III. QUESTIONS PRESENTED

Hereunder petitioner lists and, in connection with each thereof, cites authorities as showing that they present substantial federal questions, the questions herein presented (and which will be presented if the writ shall be granted) as follows:

1. Where tax rates have been the subject of a protest before the Court of Tax Review of the State of Oklahoma on the ground that they were computed without reference to the total legally assessed valuation of property liable therefor, and where dismissal of such protest for want of jurisdiction of such ground of complaint has been affirmed by the Oklahoma Supreme Court, and that court in its opinion as to such affirmance has cited cases showing that a taxpayers's remedy for such complaint is to bring such an action as petitioner brought in this case, attacking the same rates on the said ground of complaint, can the Oklahoma Supreme Court lawfully refuse to consider the said ground of illegality, basing its refusal on a state-

ment that said earlier decision finally determined the legality of said tax rates?

Hughes v. *U. S.*, 4 Wall. 232, 71 U. S. 232, 18 L. ed. 303.

2. Could an Oklahoma school district levy a tax for 1938 purposes, and determine the rate thereof by dividing its financial requirements by any figure other than that shown as the total assessed valuation of all property liable therefor as set forth in the abstract of 1938 assessed valuations required by Section 9, Chap. 115, Session Laws of Oklahoma 1933?

Provident Institution for Savings v. *Commonwealth of Massachusetts*, 6 Wall. 611, 73 U. S. 611, 18 L. ed. 907.

3. Can the property of a public service corporation in Oklahoma be charged with taxes computed by applying the rate thereof to a sum entered on the assessment rolls which does not appear on, and cannot be determined from, the face of the certified assessment of its property made by the State Board of Equalization?

Anniston City Land Co. v. *State*, 185 Ala. 482, 64 So. 110.

4. Where the record shows that a public service corporation did not render any of its property, for assessment, as having taxable situs in a given school district, can it be charged with taxes based on a figure purporting to be the assessed valuation of its property within such district where it has had no notice or opportunity to be heard?

Central of Georgia R. Co. v. *Wright*, 207 U. S. 127, 52 L. ed. 134.

5. Where the year's requirements, supposed to be raised by taxation, amount to $40,644.08 and rates of levy to raise said amount are computed by dividing said

sum by a figure supposed to equal the total assessed valuation of property liable for said levy but which, in fact, does not comprise the total of figures entered on the assessment rolls for property identifiable as having taxable situs within the levying district, are those taxpayers whose properties are listed as having such taxable situs, and so valued as to be required to pay $34,650.35, prejudiced and discriminated against when they are required to pay $34,650.35 toward said requirements and, also, to contribute a full proportion of the deficiency through taxation in future years?

Auditor General v. *Hughitt*, 132 Mich. 311, 93 N. W. 621.

IV. REASONS RELIED ON FOR GRANTING THE WRIT

The judgment, in so far as it is based on the appellate court's refusal to consider the complaint against the legality of the rates of levy, on the ground that the legality thereof was determined in *Texas-Empire Pipe Line Co.* v. *Tulsa County Excise Board*, 187 Okla. 591, 104 Pac. (2d) 441, is contrary to the Oklahoma Supreme Court's own decisions holding that, on a second appeal on the same question, it is bound to follow its earlier decision on said question as "the law of the case."

In re. Assessment of Kansas City So. Ry. Co., 175 Okla. 444 (445), 53 Pac. (2d) 536, and cases therein cited.

Also, it is contrary to said court's own decisions holding that where suit between the same parties over the same subject-matter has been the subject of a former appeal, and said appeal was disposed of without determining the merits of the controversy, the decision in the former appeal does not pre-

vent determination of the controversy on its merits in a second appeal. *Dickson* v. *Taylor et al.*, 129 Okla. 191, 263 Pac. 1102.

And such holding in the case at bar is not binding on this Court.

Zeckendorf v. *Steinfeld*, 225 U. S. 445, 56 L. ed. 1156.

Said judgment, on that point, so far departs from the accepted and usual course of judicial proceedings, and so far sanctions such a departure by the trial court, as to work complete denial of petitioner's rights, calling for the exercise of this Court's power to review.

Said earlier decision, affirming dismissal of complaint against the legality of said rates, attacked on the ground that they were fixed without reference to a legally determined total of the 1938 assessed valuation of property liable therefor, the grounds of said dismissal being that the question raised involved application of a legal levy to specific property and not the legality of the rate, is not reasonable, and is directly contrary to conclusions reached, on the same question, by the highest courts of other states.

Auditor General v. *Hughitt*, 132 Mich. 311, 93 N. W. 621;

Hersey v. *Bd. of Supervisors of Milwaukee County*, 16 Wis. 185, 82 Am. Dec. 713.

The record shows that the State Board of Equalization did not assess any property of public service corporations

for 1938 purposes of said four disorganized districts; therefore, it may not possibly be assumed that a total of such assessments might have been recorded by that board. This Court has said that an assessment, to be valid, should be recorded. *Illinois Central R. Co.* v. *Kentucky*, 218 U. S. 551 (559), 54 L. ed. 1147 (1149).

The record shows that the rates of levy are based upon figures resulting from blending 1938 assessed valuations of real estate with assessed valuations, as fixed by the assessing officers for earlier years. The record contains positive testimony that the valuations used for public service corporation properties were, in fact, the valuations of such properties as assessed for earlier years. See assessor's testimony at R. 48. As to personal property and properties owned by other types of corporations, compare the figures set out in paragraph 11 of the First Amended Petition (R. 11) with plaintiff's Exhibit 5 (R. 67-70; received in evidence, R. 52). This Court has held such assessments void.

People of the State of California v. *Central P. R. Co.*, 127 U. S. 1, 32 L. ed. 150.

The judgment sought to be reviewed, in so far as it is based on the appellate court's statement that the record before it, on appeal, does not contain evidence clearly showing that the assessor's acts, complained of, were not contrary to the acts of the State Board of Equalization in assessing petitioner's property, as shown by said board's record of such assessing acts, is not only unsupported by the record,

but is directly contrary to positive, undenied and undeniable evidence therein contained. Such judgment, therefore, on that feature of the case, is based upon non-federal grounds which are not substantial enough to support it, in themselves. This Court has jurisdiction to review such a judgment in certiorari proceedings.

Ward et al. v. *Board of County Commissioners of Love County, Oklahoma*, 253 U. S. 17, 64 L. ed. 751;

Ancient Egyptian Arabic Order of Nobles of the Mystic Shrine v. *Michaux*, 279 U. S. 737, 73 L. ed. 931.

Said judgment, in so far as it holds that petitioner's rights were not violated by lack of notice and opportunity to be heard as to the 1938 assessment of its properties for the purposes of said disorganized districts, is probably not in accord with decisions of this Court on the question.

Central of Georgia R. Co. v. *Wright*, 207 U. S. 127, 52 L. ed. 134.

And said decision is directly contrary to the Oklahoma Supreme Court's earlier and still controlling decisions on the point.

In re. Moore (*Tulsa County* v. *Moore*), 182 Okla. 330, 77 Pac. (2d) 676;

Taber, County Treas., v. *Carter Oil Co.*, 176 Okla. 638, 57 Pac. (2d) 248.

The judgment, in so far as it holds that petitioner's complaint as to lack of notice and opportunity to be heard may be denied on authority of *Bonaparte* v. *American Vinegar Mfg. Co.*, 161 Okla. 54, 17 Pac. (2d) 441, is contrary to the

Oklahoma Supreme Court's statements differentiating the lack of notice, therein involved, from lack of notice, such as is involved in the case at bar, which is the same as the lack of notice involved in *Tulsa County* v. *Moore, supra,* which differentiation was set out in the opinion in said Moore case, to-wit:

> "In that (American Vinegar Mfg. Co.) case, however, THIS COURT POINTED OUT that one who had not rendered property for taxation had the right to appear before the board of equalization to be heard on any assessment thereof made by it" (182 Okla. 332).

V. ASSIGNMENTS OF ERROR

1. The Supreme Court of the State of Oklahoma erred in deciding a federal question of substance adversely to petitioner's contentions by disregarding applicable controlling decisions of said court and contrary to applicable controlling decisions of this Honorable Court.

2. The Supreme Court of the State of Oklahoma erred in affirming the judgment of the District Court of Tulsa County, Oklahoma, in that it thereby held and decided that the legality of the rates of levy, of which petitioner complained, had already been established by said appellate court's earlier decision affirming judgment and order of the Court of Tax Review of the State of Oklahoma dismissing, for want of jurisdiction, a complaint that said rates were illegal because they were not based, respectively, on lawful

abstracts of 1938 assessed valuations of all properties subject thereto.

3. Said appellate court erred in affirming the judgment of the District Court of Tulsa County, Oklahoma, in that it thereby held and decided that petitioner's property which was located, on January 1, 1938, within the respective areas of the four taxing units involved, was assessed by the State Board of Equalization as having taxable situs January 1, 1938, within said respective areas, and as having assessed valuations of $51,140.00 within the area of disorganized School District No. 4,$32,661.00 within the area of disorganized School District No. 12, $1,948,787.00 within the area of disorganized School District No. 28, and $17,079.00 within the area of disorganized Consolidated School District No. 1.

4. Said appellate court erred in affirming the judgment of said trial court in that it thereby held and decided that petitioner was not entitled to notice and opportunity to be heard before its property could be lawfully assessed by the State Board of Equalization as having 1938 taxable situs, and said assessed valuations, within said respective areas, and in that it thereby held and decided that the petitioner was liable for taxes levied for the purpose of the respective taxing units embracing said respective areas, regardless of the fact that such taxable situs and assessed valuations had been fixed without notice to petitioner, without petitioner's consent, and without affording, to petitioner, any opportunity to be heard with regard thereto.

5. Said appellate court erred in refusing to reverse the judgment of the District Court of Tulsa County, Oklahoma.

6. Said appellate court erred in holding that the county assessor of Tulsa County was authorized to enter, on the 1938 tax rolls for the four taxing units involved, as the 1938 assessed valuation of petitioner's property located in said districts, respectively, on January 1, 1938, figures which did not appear, and which could not be calculated or determined from any matter appearing, on the face of the State Board of Equalization's record of its 1938 assessment of petitioner's property, as certified to by the state auditor, and as transmitted by said board to said county assessor.

7. Said appellate court erred in failing to hold void, because violative of the Fourteenth Amendment to the Federal Constitution, the ordinance, levying the taxes complained of, and fixing the rates thereof.

8. Said appellate court erred in holding that petitioner had failed to allege and prove, according to the record before said court on appeal (1) that it had been deprived of any fundamental and substantial right; (2) that it had been injured; (3) that the rates complained of were fraudulently fixed, or (4) that the purported assessment of petitioner's property was fraudulently entered on the tax rolls of the four taxing units involved.

9. The Supreme Court of the State of Oklahoma erred in upholding, as uniform and non-discriminatory, the tax rates of which petitioner complains, and the procedure where-

by the taxes were levied on petitioner and its property, and whereby the taxes were collected from petitioner.

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued under the seal of this Court, directed to the Supreme Court of the State of Oklahoma, commanding said court to certify and send to this Court on a day certain, to be therein designated, a full and complete transcript of the record and all proceedings of the Supreme Court of the State of Oklahoma in the case which is entitled in that court: "In the Supreme Court of the State of Oklahoma, Public Service Company of Oklahoma, a Corporation, Plaintiff in Error, versus Joe T. Parkinson, County Treasurer of Tulsa County, Oklahoma, Defendant in Error, No. 30852," to the end that said cause may be reviewed and determined by this Court as provided by law, and that your petitioner may have such other and further relief or remedy in the premises as to this Court may seem appropriate, and that the judgment of the Supreme Court of the State of Oklahoma, entered in said cause, be reversed by this Honorable Court.

Respectfully submitted,

MASTIN GESCHWIND,
Oklahoma City, Oklahoma,
Counsel for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

(Emphases supplied by the writer)

I. THE OPINIONS OF THE COURT BELOW

Petitioner prays for a review of the judgment entered in its cause No. 30852 by the Supreme Court of the State of Oklahoma on February 2, 1943 (R. 81-86). Said decision has not been officially reported, but may be found at 131 Pac. (2d) 745. Said judgment became final on June 15, 1943, when the petition for rehearing was denied (R. 86). A copy of said opinion appears as Appendix "B" hereto.

In said opinion, said appellate court states that the legality of the rates of levies, attacked by this petitioner, has already been established. As authority for that statement said court cites its decision and opinion in *Texas-Empire Pipe Company et al.* v. *Tulsa County Excise Board* (its No. 29210, decided December 17, 1939, rehearing denied July 16, 1940), which is officially reported at page 591, volume 187 of the Oklahoma Reports. Also, it may be found at 104 Pac. (2d) 441. A copy of said opinion appears as Appendix "A" hereto.

II. JURISDICTION

As showing the grounds on which the jurisdiction of this Court is invoked, the statutory provisions, and the decisions relied on, the matter contained in the foregoing petition, under heading II—Jurisdiction is here referred to and

adopted, as a whole, as petitioner's brief in support of its claim that this Court has jurisdiction to review said appellate court's judgment, complained of, and to grant relief as prayed for by petitioner.

III. STATEMENT OF THE CASE

The facts in the case having been stated sufficiently, in the writer's opinion, in the "Summary Statement of the Matter Involved" within the foregoing petition, it is not deemed necessary to burden this brief with repetition. As stating the facts involved in the case, said portion of the petition is adopted to meet the requirements that this brief shall contain a statement of the facts material to this Court's consideration of the questions presented.

Petitioner's complaint that the sum which it seeks to recover was taken without due process of law, and under procedure by which petitioner was denied equal protection of the law, in violation of its rights guaranteed by the Fourteenth Amendment to the Federal Constitution, was explicitly pleaded in the trial court (R. 16) before trial commenced, and, on appeal, said complaint was presented in express terms to the appellate court (R. 90-93).

The rulings of the trial court, and of the appellate court, have already been set forth, respectively, in sub-section 3 of Part II—Jurisdiction in the foregoing petition.

IV. ASSIGNMENTS OF ERROR

Nine assignments of error in the judgment sought to be reviewed are set out on pages 24-26 of this document, as a part of the foregoing petition. Five of said assignments, Nos. 1, 2, 4, 5 and 7 are relied on by petitioner to sustain its application for issuance of the writ prayed for; said assignments are referred to and adopted as a part of this brief.

V. ARGUMENT

SUMMARY OF ARGUMENT

PROPOSITION No. 1.

Where the Court of Tax Review of the State of Oklahoma dismissed a class action attacking legality of rates of certain tax levies on the ground that they were not computed with reference to the total legally assessed valuation of property liable therefor, and the Supreme Court of the State of Oklahoma affirmed said dismissal on the ground that said trial court lacked jurisdiction to consider said ground of complaint, a taxpayer affected by said rates, attacking them on the same ground in a court shown by said Supreme Court decision to have jurisdiction to consider such ground, is deprived of property without due process, and is denied equal protection of the law, when, on appeal from adverse decision, said Supreme Court fails to consider such ground of complaint, but disposes of it by saying that the legality of said rates had been finally determined in said former appeal.

PROPOSITION No. 2.

Where a state court's decision is based on an untenable statement as to a non-federal question of fact, this Court will disregard it and will consider the real and decisive federal question presented to such state court.

PART 1.

The statement that the legality of the involved rates of levy has already been established, relied on in the opinion as a state-

ment of fact barring consideration of the federal question presented, is untenable.

PART 2.

The statement that the appeal record does not contain proof that the assessor's entries on the tax rolls were not in conflict with the record of the action of the assessing board is untenable; it is positively refuted by the record.

PART 3.

The statement that the State Board of Equalization informed itself fully as to situs, extent and value of petitioner's property within the involved taxing units, relied on in the opinion as disposing of petitioner's contentions to the contrary, and, therefore, carrying with it the inferences that such action was taken either consonant with (1) petitioner's return, (2) consent, (3) notice and opportunity for hearing afforded petitioner, or the inference that petitioner had not pleaded and proved the contrary, is untenable; it is positively refuted by the record.

ARGUMENT AND AUTHORITIES

In support of said assigned errors Nos. 1, 2 and 5, petitioner presents the following:

PROPOSITION No. 1.

Where the Court of Tax Review of the State of Oklahoma dismissed a class action attacking legality of rates of certain tax levies on the ground that they were not computed with reference to the total legally assessed valuation of property liable therefor, and the Supreme Court of the State of Oklahoma affirmed said dismissal on the ground that said trial court lacked jurisdiction to consider said ground of complaint, a taxpayer affected by said rates, attacking them on the same ground in a court shown by said Supreme Court decision to have jurisdiction to consider such ground, is deprived of property without due process, and is denied equal protection of the law, when, on appeal from adverse decision, said Supreme Court fails to consider such ground of complaint, but disposes of it by saying that the legality of said rates had been finally determined in said former appeal.

The decision here sought to be reviewed has the effect of holding that petitioner's right to have the legality of the involved rates of levies considered is barred by the Oklahoma Supreme Court's decision of the case of *Texas-Empire Pipe Line Company et al.* v. *Tulsa County Excise Board,* 187 Okla. 591, 104 Pac. (2d) 441. The opinion in said case shows that the court below had refused to consider the asserted ground of complaint for want of jurisdiction and that said Supreme Court's affirmance was based on want of jurisdiction of the trial court. In *Hughes* v. *United States,* 4 Wall. 232, 71 U. S. 232, 18 L. ed. 303, 305, this Court said:

> "* * * In order that a judgment may constitute a bar to another suit, it must be rendered in a proceeding between the same parties or their privies, and the point of controversy must be the same in both cases, and must be determined on its merits. If the first suit was dismissed for defect of pleadings, or parties, or a misconception of the form of proceeding, or the want of jurisdiction, or was disposed of on any ground which did not go to the merits of the action, the judgment rendered will prove no bar to another suit. *Walden* v. *Bodley,* 14 Pet. 156; 1 Greenl. Ev. Secs. 529, 530, and authorities there cited" (18 L. ed. 305).

Also, see *Smith* v. *McNeal,* 109 U. S. 426, 27 L. ed. 986.

A decision of the highest court of a state may as effectively deprive a citizen of the protection of the Fourteenth Amendment as may an act of the Legislature. *Scott* v. *McNeal,* 154 U. S. 34, 38 L. ed. 896; *Chicago, Burlington & Quincy R. R. Co.* v. *City of Chicago,* 166 U. S. 226, 41 L. ed. 979.

The Supreme Court of the State of Oklahoma is committed to the principle that termination, on appeal, of an action between the same parties and concerning the same subject-matter by any means other than decision on the merits, shall not be a bar to a second suit. That court, in the case of *Dickson* v. *Taylor et al.*, 129 Okla. 191, 263 Pac. 1102, said:

> "It is urged by the plaintiff that the question above discussed is *res adjudicata*, as having been decided adversely to the defendant in the previous appeal of this case. *Dickson* v. *Taylor and Buck*, 101 Okla. 119, 223 Pac. 143.
>
> "The general rule applicable to this question has been stated to be that a judgment of reversal which does not purport to pass on the merits of the controversy does not operate as *res adjudicata*. An examination of the above opinion discloses that this case was reversed because of the failure of the defendant in error to file a brief. It does not disclose that the case was considered on its merits for the purpose of determining the issues there and here presented. We have a right to examine the record in this case upon that appeal, and though we find that a petition for rehearing was filed and presented, there is nothing in the opinion of the court, nor in the order overruling the petition for rehearing showing the case was considered on its merits, and the questions here presented have, therefore, not become *res adjudicata*. *Clark* v. *First National Bank*, 59 Okla. 2, 157 Pac. 96; *Yale* v. *Noble*, 113 Okla. 106, 239 Pac. 463" (129 Okla. 194).

In addition to its recognition of said rule in the above-quoted case, and in the cases therein cited, said court also recognized the principle in the case of *Howard* v. *Owens*, 142 Okla. 82, 285 Pac. 5, certiorari denied (1930), 282 U. S. 840, 75 L. ed. 746.

This Court will consider that, under Oklahoma law, the dismissal of the former appeal for want of jurisdiction does not conclude petitioner's right to have a determination, on the merits, of its contention that the rates of levies, here involved, are illegal on the ground that they were not computed with reference to the total legally assessed valuation of property liable therefor. *Erie R. R. Co.* v. *Tompkins*, 304 U. S. 64, 82 L. ed. 1188.

In support of said assigned errors Nos. 1, 4, 5 and 7, petitioner presents the following:

PROPOSITION No. 2.

Where a state court's decision is based on an untenable statement as to a non-federal question of fact, this Court will disregard it and will consider the real and decisive federal question presented to such state court.

Argument and authorities in support of the stated proposition will be presented under sub-propositions designated as Parts 1, 2 and 3.

PART 1.

The statement that the legality of the involved rates of levy has already been established, relied on in the opinion as a statement of fact barring consideration of the federal question presented, is untenable.

As argument and authority in support of this part of the above-stated proposition, the matter set forth under Proposition No. 1 is referred to and adopted.

The appellate court's reliance on said statement, as a fact, must be recognized as the sole basis for denial of peti-

tioner's complaint against the legality of the rates on the grounds that they were computed without reference to 1938 total assessed valuations of property liable for the taxes. No other conclusion is reasonable. That statement is made in view of the undenied testimony of the county assessor (R. 35), that none of the 1938 assessments of public service corporations, transmitted to him by the State Board of Equalization, showed any valuation for property within any of the four involved taxing units. It follows that no rates of levy for the purposes of said taxing units could have been computed without denying, to every affected taxpayer within said units, the equal protection of the law guaranteed by the Fourteenth Amendment to the Federal Constitution. *Auditor General* v. *Hughitt,* 132 Mich. 311, 93 N. W. 621.

PART 2.

The statement that the appeal record does not contain proof that the assessor's entries on the tax rolls were not in conflict with the record of the action of the assessing board is untenable; it is positively refuted by the record.

In the foregoing petition it was pointed out that the Oklahoma Supreme Court, in so many words, said that the appeal record before it contained no proof that the assessing board affirmatively fixed the taxing situs of petitioner's property other than as reflected by the final tax rolls as made to appear by the county assessor.

In that connection, it also was pointed out that the county assessor testified that the two-page "Summary of Assess-

ment" (R. 65, received in evidence, R. 36) constituted a complete summary of the 1938 assessment of petitioner's property as transmitted to him by the State Board of Equalization, and that all of the school districts mentioned in the various parts of the return are reflected in said summary.

The record contains testimony of plaintiff's witness, T. M. Markley, which was not denied and which was not impaired in any manner, that there was no separation of petitioner's property within School District No. 22 shown in its return *"or in the assessment by the State Board of Equalization"* (R. 53-55).

That being the state of the record, it is submitted that the statements in the appellate court's opinion are, to say the least, erroneous, and petitioner insists that said statements not only have no fair support in the record, but are positively refuted by undisputed facts shown by the record.

It is the province of this Court to inquire not only whether a federal right, properly brought to the attention of a state court, was denied by it in direct terms, but also whether it was denied in substance and effect by interposing a non-federal ground of decision having no fair support. See *Ancient Egyptian Arabic Order of Nobles of the Mystic Shrine* v. *Michaux,* 279 U. S. 737, 73 L. ed. 931, 936; also see cases therein cited.

PART 3.

The statement that the State Board of Equalization informed itself fully as to situs, extent and value of petitioner's property within the involved taxing units, relied on in the opinion as disposing of petitioner's contentions to the contrary, and, therefore, carrying with it the inferences that such action was taken either consonant with (1) petitioner's return, (2) consent, (3) notice and opportunity for hearing afforded petitioner, or the inference that petitioner had not pleaded and proved the contrary, is untenable; it is positively refuted by the record.

In the opinion supporting the decision sought to be reviewed, the Oklahoma Supreme Court said:

> "* * * This record does not contain a copy of the return or report filed in this connection, but it is conceded that plaintiff thereby disclosed all of its taxable property located in School District No. 22 as enlarged by the annexations. We are not advised of the minuteness of detail with which it was so shown. *It is conceded, however, that the return did not disclose any effort or intention to further segregate the specific items of the property to lesser areas within the then District No.* 22.
>
> "Thus this property came under actual scrutiny of the assessing board and was officially acted upon by it, and it doubtless did, as was its duty, inform itself fully as to situs, extent and value of all such property."

Giving due consideration to the first part of the above quotation, it is clear that the effect of the last-quoted paragraph is to hold that the assessing board probably did establish that some of the petitioner's property had taxable situs within the areas of lesser taxing units within District No. 22. And its effect is to approve establishment of such taxable situs although the return did not disclose any segrega-

tion, to lesser included areas, of any of petitioner's property within District No. 22.

Furthermore, if due consideration be given to the pleadings and evidence in the record, it is clear that the effect of the last-quoted paragraph is to approve such action, if it was taken by the assessing board, although done without notice to petitioner, without its consent, and without affording any opportunity for hearing. In support of that statement, a brief analysis of the pertinent portions of the record is next presented.

Petitioner based its complaint on the alleged facts that its property had been established as having taxable situs in said areas without its consent, without notice, and without its being afforded an opportunity to be heard. See paragraph 20 of Plaintiff's First Amended Petition, R. 14.

Petitioner's witness, T. M. Markley, testified (R. 55) as follows:

Q. "Now, Mr. Markley, were those figures put on the tax rolls with the consent of the Public Service Corporation?

A. Absolutely not.

* * *

Q. You say the *first* you knew of it was *after* the supplemental certificate had been made?

A. Yes."

And petitioner's witness, Dan A. Rowe, the county assessor, testified (R. 44-45) as follows:

Q. "Mr. Rowe, before you entered these valuations and charges for levies of these disorganized districts on

the tax rolls, did you give any notice to this plaintiff that you intended to put that property on the roll as being within those four districts?

A. I had no authority giving any notice.

Q. You didn't give it?

A. I didn't, except by verbal conversation.

* * *

Q. Did you before you made that certificate talk to any representative of this plaintiff about that situation?

A. Ted (Markley) and I discussed it verbally.

Q. Before you made that certificate?

A. No, I told him what I was going to have to do—and even talked about if there wasn't some way to enjoin it for that particular year. There was several of them notified about it by 'phone and otherwise—probably discussed it with you, too."

In its opinion supporting the decision sought to be reviewed, the Oklahoma Supreme Court did not mention plaintiff's pleas that portions of its property had been established as having 1938 taxable situs within the areas of the disorganized districts without its consent, without notice, and without any opportunity being afforded for hearing. Neither did said court mention the evidence showing lack of consent, notice or opportunity to be heard. It was without authority to ignore those pleas and the undenied testimony sustaining them.

"When the evidence in a case, or on a material point, is undisputed, its legal effect presents a question of law and not of fact, and the verdict is subject to review, and the conclusion therein reached may be set aside if against the evidence. * * * So also the verdict will not be permitted to stand where it is directly contradictory of the

evidence; * * *, or against admissions; * * *." 4 C. J. 857; Evidence, § 2835.

Petitioner's property could not, without its consent, be assessed as having taxable situs in any taxing unit not disclosed on its return, except pursuant to notice and opportunity for hearing thereon, without depriving petitioner of substantial rights guaranteed by the Fourteenth Amendment to the Federal Constitution. *Central of Georgia Ry. Co.* v. *Wright*, 207 U. S. 127, 52 L. ed. 134.

VI. CONCLUSION

It is respectfully submitted that the record and authorities cited show that this case is one calling for the exercise by this Court of its supervisory powers, by granting a writ of certiorari and thereafter reviewing the opinion and decision of the Supreme Court of the State of Oklahoma and reversing said decision.

Respectfully submitted,

MASTIN GESCHWIND,
Oklahoma City, Oklahoma,
Counsel for Petitioner.

September, 1943.

APPENDIX

Appendix A 43-46
Appendix B 47-52

APPENDIX A.

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

TEXAS-EMPIRE PIPE LINE CO. ET AL., P. E.

v.

TULSA COUNTY, OKLAHOMA, EXCISE BOARD, D. E.

No. 29,210

Syllabus

1. An independent school district to which area of another district, in whole or in part, is attached, does not become liable for the bonded indebtedness or outstanding unpaid obligations to which such attached area was liable before the annexation, the taxes for such obligations can still be levied against the property so annexed, notwithstanding that by such annexation such property also becomes burdened with a share of the obligations of the independent district.
2. The Court of Tax Review does not have jurisdiction to determine legality of application of tax levy to specific property or to review the acts of an excise board as to the valuation of properties, where the levy made thereon is a legal levy.

Appeal from the Court of Tax Review. Hon. Tom P. Pace, F. Hiner Dale and Jesse J. Worten, Judges.

This action originated in the Court of Tax Review, wherein protestants jointly filed a protest against the Excise Board of Tulsa County, protesting the levy set up by the Excise Board against the property located within what formerly was the bounds of Dependent School District No. 4, Independent School District No. 28, Independent School District No. 12, and Consolidated School District No. 1 of Tulsa County, for fiscal year 1938-39.

AFFIRMED.

Mastin Geschwind for Plaintiff in Error.

Dixie Gilmer, County Attorney, John F. Conway, Assistant County Attorney, Rosenstein & Rinehart for Defendant in Error.

WELCH, C. J.

The Court of Tax Review dismissed the protest for lack of jurisdiction, protestants appeal.

The petition in error sets out four grounds of protest, numbered 19, 20, 21 and 22; all grounds are for the same reason, therefore, we will treat them as one.

The protestant contends that the Court of Tax Review erred when it dismissed all four grounds for lack of jurisdiction, his protest being in substance that the rate of levy fixed by excise board to pay obligations of four separate school districts which had been annexed to another district, said obligations having been incurred before the annexation, were illegal. Protestants' reasons *therefore* being that the certificates of assessed valuation, and the procedure followed by the Excise Board in arriving at the valuation were unlawful, and that the obligations originally incurred by said disorganized school districts had become finally fixed as charges against all property in the Independent District of which they became a part by the annexation.

Prior to July 1, 1938, dependent school district No. 4, independent school district No. 12; independent school district No. 28, and consolidated school district No. 1, had been annexed to independent school district No. 22 of Tulsa County. On July 1, 1938, each of the above annexed districts still had outstanding unpaid bonded debts, which were incurred prior to their annexation.

Prior to July 1, 1938, the outstanding bonded indebtedness of these annexed districts had been added to and considered a part of the sinking fund obligations of Independent School District No. 22, as enlarged after the annexation.

The Excise Board of Tulsa County caused levies to be certified against the property in the four annexed districts, for the fiscal year commencing July 1, 1938, for the purpose of creating a fund to pay the interest and meet at maturity the bonded indebtedness outstanding against these four annexed districts.

At the request of the Excise Board the assessor prepared a certificate, which gave a valuation on real estate, personal property, the property of corporations, and the

property of public service corporations in each of the annexed districts. As to public service corporations the assessor used the 1926 valuation in three of the annexed districts, and the 1933 valuation in one of them. These were the years the districts were annexed to district No. 22, respectively, and were the last years for which there was available a valuation certified by the State Board of Equalization or the Oklahoma Tax Commission as to the property of public service companies within the area of these annexed districts.

After making a careful study of the brief and the authorities cited in support of the contentions of the petitioners in error, we find that the question before this court is not one pertaining to an illegal levy, but is one of an alleged illegal application of the levy.

We have heretofore held that obligations incurred in one school district cannot be removed from the property of such district by annexing such property to an independent district, but taxes for such obligations can still be levied against the property so annexed, notwithstanding that by such annexation such property becomes burdened with a shar*t* of the obligations of the independent district of which it becomes a part by the annexation. *Missouri-Kansas-Texas Ry. Co.* v. *Bryan County Excise Board,* 181 Okla. 229, 73 Pac. (2d) 173; *Protest of St. L. S. F. Ry. Co.,* 164 Okla. 229, 23 Pac. (2d) 699; *In re: Protest of St. L. S. F. Ry. Co.,* 136 Okla. 265, 277 Pac. 932.

Therefore the levy made by the Excise Board of Tulsa County against property within the bounds of the four districts as they were before the annexation, to pay obligations outstanding against them at the time of the annexation was a legal levy. Whether the Excise Board proceeded in accordance with the law in arriving at the valuation of the property within the bounds of what had been the four separate districts, the Court of Tax Review was without jurisdiction to determine.

The jurisdiction of the Court of Tax Review is limited to a consideration only of alleged illegal levies, by section 12306, O. S. 1931, 68 Okla. St. Ann., Sec. 332. Said Court of Tax Review therefore has no authority to consider the

alleged illegal application of a valid tax levy to specific property. *M. K. & T. Ry. Co.* v. *Cowden, Co. Treas.*, 184 Okla. 260, 86 Pac. (2d) 776; *Muskogee County Excise Board* v. *Stubbs et al.*, 172 Okla. 435, 45 Pac. (2d) 721; *Protest of First National Bank of Guthrie*, 136 Okla. 141, 276 Pac. 766; *In re*: *Gibbens et al.*, 142 Okla. 180, 286 Pac. 318; *Protest of First National Bank of Enid*, 143 Okla. 115, 287 Pac. 1043.

In considering the motion to dismiss filed herein by defendants in error, the movant has cited for his authorities *Atchley* v. *McFadden*, 178 Okla. 303, 64 Pac. (2d) 269; *Ingram* v. *Groves et al.*, 84 Okla. 159, 202 Pac. 1019. We are of the opinion that these cases would be inapplicable as to the plaintiff in error herein, therefore, the motion to dismiss is denied.

Judgment of the Court of Tax Review is affirmed.

Riley, Corn, Gibson and Danner, Concur.

Osborn and Davison, JJ., Concur specially.

Hurst, J., Dissents.

Bayless, V. C. J., Absent.

APPENDIX B.

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

PUBLIC SERVICE COMPANY OF OKLAHOMA, P. E.

v.

JOE T. PARKINSON, County Treasurer, Tulsa County, Oklahoma, D. E.

No. 30,852.

Syllabus

1. When ad valorem taxes are paid under protest (Sec. 12665, O. S. 1931, similar to 68 O. S. 1941, Sec. 15.50), and suit is brought for recovery thereof on the theory that the assessment of taxpayers' property was void on account of the method of making it, absent any contention or claim that taxpayer did not in fact own property of the taxable situs and value stated, the burden is on plaintiff to clearly show invalidity of the assessment, and on failure to so show, judgment is properly rendered for defendant.

Appeal from the District Court of Tulsa County, Oklahoma. Hon. Harry L. S. Halley, Judge.

Action by Public Service Company to recover ad valorem taxes paid under protest. From judgment for defendant, the plaintiff appeals.

AFFIRMED

Mastin Geschwind, Oklahoma City, Okla., for Plaintiff in Error.

C. H. Rosenstein, Dixie Gilmer, County Attorney of Tulsa County, Oklahoma; Wm. M. Taylor, Assistant County Attorney, all of Tulsa, Oklahoma, for Defendant in Error.

WELCH, J.

In this action the taxpayer seeks to recover $8,088.71 taxes paid under protest. The tax was levied in 1938 for the benefit of the sinking funds of former school districts No. 4, No. 12, No. 28 and No. 1 in Tulsa County. The amount plaintiff seeks to recover is the total amounts so levied against its property for that purpose.

Prior to the levy the said school districts had been annexed by and had become a part of school district No. 22 of

Tulsa County. At the time of the levy the taxable property within the respective areas of such annexed districts was liable to taxation for retirement of prior indebtedness. *M. K. & T. Ry. Co.* v. *Excise Board of Bryan County*, 181 Okla. 229, 73 Pac. (2d) 173. The legality of the rate of levy has been established. *Texas-Empire Pipe Line Co.* v. *Tulsa County Excise Board*, 187 Okla. 591, 104 Pac. (2d) 441.

The theory of plaintiff's case is that its taxable property within such area was not assessed. That the valuations and assessments as made to appear upon the tax rolls of Tulsa County by the county assessor are void. Plaintiff does not contend that it did not own taxable property within such areas equal to the respective valuations as shown by such rolls.

In its return of property for tax purposes plaintiff merely reported that it owned certain taxable property located in school district No. 22 as it then existed. The State Auditor certified to the county treasurer that the State Board of Equalization had assessed plaintiff's property in School District No. 22 at $4,902,400. *No further details relating to the action of the State Board was contained in the auditor's certificate.*

After the receipt of such certificate the county assessor caused his tax rolls to show taxable property belonging to plaintiff as assessed within the geographical areas of the first named former school districts as follows:

No. 4	$ 51,140
No. 12	32,661
No. 28	1,948,787
No. 1	17,079

It is plaintiff's position that the State Board of Equalization has exclusive power to assess its property; that such board failed to specify the assessed value in each of the several areas, which resulted in a total failure to assess the same in such four areas for the purposes here shown, and that the County Assessor has no power to cause his tax rolls to appear as shown, because he had no authority to assess this character of property.

No reported case similar in fact has been called to our attention. We have, however, some well established legal principles from the cited cases and others which guide us in considering the present issues. We take it as elementary that the law does not intend to deliberately aid a property owner to escape payment of his just proportion of taxes which his taxable property should bear. Should plaintiff's contentions here be sustained, including its suggestion that its property cannot now be assessed, then this property, though its taxable value and physical situs is not contested, would completely escape this legally levied tax.

It is true that certain formalities must be observed in the subjecting of property to taxation. This is so in the interest of an orderly system, and probably of more importance, in the protection of the individual taxpayer. *Frazier* v. *Prince*, 8 Okla. 253, 58 Pac. 751, and *Oklahoma Tax Commission* v. *Rittenhouse*, 176 Okla. 291, 55 Pac. (2d) 70.

Though in *Independent Pipe Line Co.* v. *State Board of Equalization*, 168 Okla. 432, 33 Pac. (2d) 797, it was held that a record of an assessment, appearing on the tax rolls as prepared by the county assessor, was not void, though the property should have been assessed by the State Board of Equalization and it seems there admitted that such board took no action.

One of the most important acts in subjecting property to tax is the matter of assessment, and that is the step with which we are here concerned. The assessment, to become invulnerable, must be made by the officer or officers clothed with lawful authority so to do. 26 R. C. L., p. 354, para. 311. This is so in the interest of an orderly system and to provide an *authorative* forum before which the owner may be heard for his protection. Such authority in this state is vested in the State Board of Equalization with respect to this character of property. Sec. 21, Art. 10, Okla. Constitution, 68 O. S. 1941, Sec. 131; *Osage & Oklahoma Company* v. *Millard, Co. Treas.*, 45 Okla. 334, 145 Pac. 797.

If there is shown here any act of omission or commission, which is in violation of a direct and mandatory statu-

tory provision, or which has had the effect of depriving this owner of a fundamental and substantial right, then our conclusion should be in its favor without regard to whether its property does or might completely escape the tax. Otherwise no such result should obtain. *Board of Com'rs of Tulsa County* v. *Sutton*, 185 Okla. 665, 95 Pac. (2d) 648, and *Bonaparte, Co. Treas.* v. *American Vinegar Mfg. Co.*, 161 Okla. 54, 17 Pac. (2d) 441.

Minute perfection of detail is not required. 61 C. J., page 737, para. 919, states the general rule as follows:

> "Unless there has been a failure to observe a mandatory statutory requirement intended for the protection of the taxpayer, the validity of an assessment roll, which is substantially correct, is not affected by errors, omissions, or irregular entries, which do not affect the substantial justice of the tax nor prejudice the rights of the taxpayer."

Our statutes required that this taxpayer submit data in writing to the assessing board; Chap. 104, page 208, S. L. 1933, Sec. 12409, O. S. 1931. It is clearly contemplated thereby that all necessary data be thus disclosed to enable the board to make a complete assessment. That return or report should include a disclosure of all taxable property owned, its value and situs. *This record does not contain a copy of the return or report filed in this connection, but it is conceded that plaintiff thereby disclosed all its taxable property located in school district No. 22 as enlarged by the annexations. We are not advised of the minuteness of detail with which it was so shown. It is conceded, however, that the return did not disclose any effort or intention to further segregate the specific items of the property to lesser areas within the then district No. 22.*

Thus this property came under actual scrutiny of the assessing board and was officially acted upon by it, and it doubtless did, as was its duty, inform itself fully as to situs, extent and value of all such property.

The final record of that board's action appears in the tax rolls of the several counties as completed by the county assessors.

The State Auditor performs the ministerial function of informing the county assessor of the board's action. Sec. 12410, O. S. 1931. The county assessor is the proper ministerial official of the board and of the state, who performs the duty of completing the tax roll, which then becomes the final record of assessment. Sec. 12411, O. S. 1931. *We agree that the county assessor is without power to make a record contrary to the action of the assessing board, or that he has discretionary powers of assessment in such a case as this.*

The record made by him in this case, however, is not shown to be in conflict with the action of the State Board. This appeal record contains no proof that the assessing board affirmatively fixed the taxing situs of this property other than as reflected by the final tax rolls as made to appear by the proper officer, the County Assessor.

These final tax rolls did reflect a further segregation of the total valuation beyond that shown by the state auditor's certificate, but it does not result in direct conflict therewith. Had the taxpayer been dissatisfied with the record of the state assessing board as made by the county assessor, we have no doubt that it might have applied for a correction. Apparently it was either satisfied that the final record so made did in fact reflect the action taken by the State Board, or was willing to let the final record so stand, or was willing to allow an error which it had induced to remain uncorrected. In such case, the taxpayer will not be heard to complain in this kind of suit where no actual definite injury is claimed or shown.

In the Bonaparte v. American Vinegar case, *supra*, it was held:

> "A petition filed in a proceeding commenced under section 9971, C. O. S. 1921 (O. S. 1931, Sec. 12665), which does not allege facts showing wherein the party commencing the action was injuriously affected by reason of the failure of the county assessor *to publish* notice *containing the name and assessed value of the personal property of such party* as required by section 9664, C.

O. S. 1921, does not state facts sufficient in law to constitute a cause of action."

Having concluded that the record of the assessment as shown by the completed tax rolls is not shown to have been made in conflict with or contrary to the conclusions of the State Board of Equalization, and that therefore no void assessment has been shown, and plaintiff having failed to plead or prove any injury, fraud or collusion, we consider the rule of the Bonaparte case applicable here.

Affirmed.

All Justices concur.

(20)

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No. 350

In the Supreme Court of the United States

October Term, 1943.

PUBLIC SERVICE COMPANY OF OKLAHOMA, A CORPORATION, *Plaintiff*,

vs.

JOE T. PARKINSON, COUNTY TREASURER OF TULSA COUNTY, OKLAHOMA, *Respondent.*

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF *CERTIORARI*.

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IN THE SUPREME COURT OF THE UNITED STATES.
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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF *CERTIORARI.*

Opinion of the Court.

The opinion of the court below has not been officially or otherwise reported. A copy of the opinion appears in the printed transcript of the record, pages 81-86. Petitioner erroneously states that it is reported in 131 P. (2d) 745.

Statement of Grounds Upon Which Jurisdiction Is Invoked.

Jurisdiction of this court is invoked by virtue of Section 344 (b), Title 28 of the United States Code, 28 U. S. C. A. 344(b), 43 Stat. L. 937 (petitioner's petition, p. 13). Specifically the jurisdiction of this court is invoked upon the ground that in the final judgment of the Supreme Court of Oklahoma in this case (the highest court of that state in which a decision could be had) there was drawn in question the validity of a statute of the State of Oklahoma on the

ground of its being repugnant to the Constitution of the United States.

Summary.

(Emphasis throughout supplied.)

This suit was originally filed by petitioner, as plaintiff, in the District Court of Tulsa County, Oklahoma, on December 9, 1938 (Rec., p. 2). The petitioner by the institution of this suit sought to recover from respondent, as defendant in the original action, certain taxes levied against plaintiff's property, located in four disorganized school districts which had been annexed to Independent School District No. 22 of Tulsa County, Oklahoma (Rec., pp. 2-5). The action was based upon a statute of the State of Oklahoma permitting taxpayers to pay taxes under protest and within thirty days thereafter institute suit against the County Treasurer for their recovery. The Oklahoma Statute authorizing the institution of suits of this nature is Section 7, Subdivision B, Art. 1, Ch. 107, Session Laws of Oklahoma 1915[1]. (Sec. 12665, Oklahoma Statutes 1931; Sec. 9971, Compiled Oklahoma Statutes 1921.)

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[1]Section 7, Subdivision B, reads:

"SECTION 7. In all cases where the illegality of the tax is alleged to arise by reason of some action from which the laws provide no appeal, the aggrieved person shall pay the full amount of the taxes at the time and in the manner provided by law, and shall give notice to the officer collecting the taxes showing the grounds of complaint and that suit will be brought against the officer for recovery of them. It shall be the duty of such collecting officer to hold such taxes separate and apart from all other taxes collected by him, for a period of thirty days and if within such time summons shall be served upon such officer in a suit for recovery of such taxes, the officer shall further hold such taxes until the final determination of such suit. All such suits shall be brought in the court having jurisdiction thereof, and they shall have precedence therein; if, upon final determination of any such suit, the court shall determine that the taxes were illegally collected, as not being due the state, county or subdivision of the county, *the court shall render judgment showing the correct and legal amount of taxes due by such person*, and shall issue such order in accordance with the court's findings, and if such order shows that the taxes so paid are in excess of the legal and correct amount due, the collecting officer *shall pay to such person the excess* and shall take his receipt therefor."

Subsequent to the enactment by the Oklahoma Legislature of the above mentioned statutes the voters of Oklahoma, pursuant to constitutional authority authorizing the electors of the state to initiate, and by popular vote adopt legislation, enacted a bill known as Initiative Petition No. 100. (Title 68, Secs. 331-341, O. S. 1941) Initiative Petition No. 100 was adopted August 7, 1928, prior to the institution of the instant action by petitioner in the District Court of Tulsa County, Oklahoma. Initiative Petition No. 100 provides that after the proper authorities have fixed the tax levies (each year) for all municipal subdivisions of the state, as provided by law, a copy of all budgets with the levies made thereon shall be filed with the state auditor of the State of Oklahoma and a like copy with the county clerk of the respective counties. Taxpayers of the state are given, at all times, the right to examine the budgets and levies on file with the respective county clerks and with the state auditor "for the purpose of checking same for illegalities in the levies made" and any taxpayer may within forty days from the date of the filing of such budgets with the state auditor protest the alleged illegality of any levy. If no protest is filed by any taxpayer as to the levies of any county or municipal subdivision thereof within said forty-day period "all appropriations and levies of said counties and municipal subdivisions thereof not protested, shall be deemed to be legal, and all proceedings for refunds or suits for refunds or recovery of taxes or to contest the validity thereof in any manner shall be barred." (Init. Pet. 100, Secs. 1 and 2; Title 68, O. S. 1941, Secs. 331-332.)[2]

[2]Title 68, Section 331, Oklahoma Statutes 1941:

"331. *Municipal Budgets and Levies—Filing—Notice.* After the officers of the several municipal subdivisions of the state, constituting the budget making bodies of such subdivisions, including counties, cities, towns, school districts and townships, shall have made and filed their budgets as required by existing laws with the county clerks, and after advertisement as now required by law, the excise boards shall meet on the last Saturday in July and from time to time thereafter until the State Board of Equalization shall

Initiative Petition No. 100 creates a special court known as a "Court of Tax Review," which court is given the power and the duty to hear and determine all protests filed under the act. Provision is made for appeals from the Court of Tax Review to the Supreme Court of Oklahoma.

The Supreme Court of Oklahoma after the adoption of

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have reported the valuation of Public Service Corporations and utilities, together with the equalized valuation of all other property, to the county, and shall then proceed to pass on appropriations and make levies for all such municipal subdivisions as now provided by law, and shall file a copy of all budgets with the levies made thereon, with the State Auditor, and one copy with the county clerks of the respective counties, and the county clerk shall immediately thereafter publish notice for one time, in some newspaper of general circulation in the county, that such budgets and levies are on file for the inspection of any citizen.

"Within three days after the filing of any such budgets and levies with the State Auditor he shall give notice by mail of the fact and date of such filing with him to any taxpayer who shall have filed written request therefor. State Question No. 152, Initiative Petition No. 100, Sec. 1, adopted Aug. 7, 1928."

Title 68, Section 332, Oklahoma Statutes 1941:

"332. *Examination of Budgets and Levies by Taxpayers—Filing Protests—Disposition of Copies—Effect of Absence of Protest—Reduction of Illegal Budgets and Levies by Excise Board.* Taxpayers of the state shall have the right at all times, to examine the budgets and levies on file with the respective county clerks of the state and with the State Auditor, for the purpose of checking same for illegalities in the levies made, and any taxpayer may, at any time within forty days from the date of filing with the State Auditor as above provided for, file a protest in writing together with three copies thereof, with the State Auditor against any alleged illegality of any levy and the State Auditor shall thereupon transmit by registered mail one copy of each to the county clerk, the county attorney and county treasurer of the county affected thereby, or said protest with the same number of copies may be filed with the county clerk in which event the county clerk shall transmit one copy of each to the State Auditor and to the county attorney and county treasurer of the county affected thereby and such filing shall have the same force and effect as though filed with the State Auditor. The said protest shall specify the said alleged illegal levy and the grounds upon which said alleged illegalities are based. Any protest filed by any taxpayer as herein provided shall inure to the benefit of all taxpayers. If no protest is filed by any taxpayer as to the levy of any county or municipal subdivision thereof within said forty-day period all appropriations and levies of said county and municipal subdivisions thereof not protested, shall be deemed to be legal, and all proceedings for refunds or suits for refunds or recovery of taxes or to contest the validity thereof in any manner shall be barred.

"The Excise Board may reconvene at any time within sixty days after the filing of the budgets and levies with the State Auditor and reduce any protested budgets and levies which the Excise Board deems to be illegal. State Question No. 152; Initiative Petition No. 100, Sec. 2, adopted Aug. 7, 1928."

Initiative Petition No. 100 held that the 1915 statute providing for the payment of taxes under protest and for the institution within thirty days thereafter of suit for the recovery of taxes so paid under protest was, by Initiative Petition No. 100, *repealed in so far as questions involving the legality of ad valorem tax levies is concerned* and that said statute remains in effect only in so far as questions may arise which involve *the application of a legal ad valorem tax levy* in an unlawful manner or to specific property. *Protest of First National Bank of Guthrie,* 136 Okl. 141, 276 Pac. 766.

The gist of the decision by the Supreme Court of Oklahoma in this case is concisely set forth in three paragraphs taken from its opinion. These read as follows:

> "There is nothing in Initiative Petition No. 100 that gives the Court of Tax Review authority to determine whether or not specific property is subject to ad valorem taxation.
>
> * * * * * * * *
>
> "The jurisdiction of the Court of Tax Review is limited to a determination of whether or not the ad valorem tax levy is legal, and that court has no jurisdiction to review the application of a legal ad valorem tax levy in an unlawful manner or to specific property.
>
> "The act repeals all acts and parts of acts in conflict therewith. Under this provision *Section 9971, C. O. S. 1921, is repealed in so far as it affects questions which involve the legality of the tax rate determined and fixed by the county excise board. But in so far as that section affects questions which involve the application of a legal ad valorem tax levy in an unlawful manner or to specific property, the same remains in force and effect.*"

Section 9971 C. O. S. 1921, referred to in the above opinion, is the same statute as Section 7, Subdivision B, Art. 1, Ch. 107, Session Laws of Oklahoma 1915.

Therefore, it is the contention of respondent that the only question in controversy in this suit was whether or not a tax levy (which for the purpose of this suit must be treated as a legal tax levy) was properly applied against the property of petitioner. All of the argument of petitioner with reference to the tax levy being void or as to its illegality pertains to matters which were not in controversy in this case. The Supreme Court of Oklahoma, in its opinion in this case, refused to pass upon those questions. This identical tax levy had been attacked in the Court of Tax Review, the Court of Tax Review had dismissed the protest and the Supreme Court of Oklahoma in another decision had affirmed the action of the Court of Tax Review. (Petitioners brief, Appendix A, pp. 43-46) For this reason the Supreme Court of Oklahoma, in its opinion in this case, disposed of the question of the legality of the rate of levy in one line. It said "The legality of the rate of levy has been established. *Texas Empire Pipe Line Company* v. *Tulsa County Excise Board,* 187 Okl. 591, 104 P. (2d) 441." (Rec., p. 82)

Because of the above facts it is the contention of respondent that no federal question was properly presented to the Supreme Court of Oklahoma in this case and the decision of the Supreme Court of Oklahoma was based solely and entirely upon non-federal grounds.

ARGUMENT.

A careful examination of the decision of the Supreme Court of Oklahoma, as reflected by its opinion in this case, discloses that this case was decided solely and entirely on non-federal grounds. The opinion (Rec., pp. 81-86) holds that if in the assessment of petitioner's property any act of omission or commission occurred, which was in violation of a direct and mandatory statutory provision which had the effect of depriving petitioner of a fundamental and substantial right, then the court's decision should be in favor of petitioner without regard to whether its property might or might not completely escape the payment of a legal tax levy. Otherwise, no such result should obtain (Rec., p. 84). The Supreme Court of Oklahoma then reviewed the facts and concluded that the assessment as shown by the completed tax rolls was not in conflict with or contrary to the conclusion of the State Board of Equalization (the statutory assessor of petitioner's property) and that, therefore, petitioner had not shown a void assessment and petitioner having failed to plead *or prove any injury,* fraud or collusion, it was not entitled to recover the taxes which it had paid under protest (Rec., pp. 84-86).

In reaching the above conclusion, the Supreme Court of Oklahoma did not determine that any statute of the State of Oklahoma was valid or invalid as being repugnant to or in accord with the Constitution of the United States. The Supreme Court of Oklahoma, by its decision in this case merely held that petitioner's property was assessed by the body authorized by the Oklahoma Statutes to assess petitioner's property; that in reporting that assessment to the local taxing authorities in Tulsa County, Oklahoma, there were certain omissions or irregular entries which did not

prejudice the rights of the taxpayer and that in such a case the taxpayer would not be heard to complain "in this kind of suit *where no actual definite injury is claimed or shown.*" (Rec., p. 85)

This court will not review a decision of the highest court of a state unless the record affirmatively discloses that a federal question was presented to the state court which was necessarily passed upon by that court and actually decided by it, or that its judgment as rendered could not have been given without deciding it.

The rule is concisely stated in *Southwestern Bell Telephone Company* v. *State of Oklahoma,* 303 U. S. 206-213, 82 L. ed. 751, in the following language:

> "We have repeatedly held that it is essential to the jurisdiction of this court in reviewing a decision of a court of a state that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the state having jurisdiction but that *its decision of the federal question was necessary to the determination of the cause; that the federal question was actually decided or that the judgment as rendered could not have been given without deciding it. De Saussure* v. *Gaillard,* 127 U. S. 216, 234, 32 L. ed. 125, 132, 8 S. Ct. 1053; *Johnson* v. *Risk,* 137 U. S. 300, 306, 307, 34 L. ed. 683, 686, 11 S. Ct. 111; *Walter A. Wood Mowing & Reaping Mach. Co.* v. *Skinner,* 139 U. S. 293, 295, 297, 35 L. ed. 193-195, 11 S. Ct. 528; *Whitney* v. *California,* 274 U. S. 357, 360, 361, 71 L. ed. 1095, 1099, 1100, 47 S. Ct. 641; *Lynch* v. *New York,* 293 U. S. 52, 54, 79 L. ed. 191, 192, 55 S. Ct. 16."

In an effort to cause it to appear affirmatively from the record in this case that a federal question was presented for decision to the Supreme Court of Oklahoma; that its decision of this federal question was necessary to the determination of the cause and that such federal question was actu-

ally decided, petitioner procured from the Supreme Court of Oklahoma a "certificate" signed by the chief justice of the Supreme Court of Oklahoma under date of the 29th day of July, 1943 (Rec., pp. 90-93).

This certificate, we submit, *does not disclose that the Supreme Court of Oklahoma based its decision in this case upon a federal ground.* The certificate recites that the petitioner in its first amended and supplemental petition filed in the District Court of Tulsa County, Oklahoma, complained that the taxes sought to be recovered had been taken from it by processes constituting deprivation of its property without due process of law and constituting a denial to it of the equal protection of the law in violation of the Fourteenth Amendment to the Constitution of the United States; that this complaint was denied by the trial court and the question preserved for presentation to the Supreme Court by assigning that the trial court's judgment was erroneous because "contrary to law;" that in its "Brief of Plaintiff in Error" petitioner presented argument and authorities to sustain its contentions as to said alleged error and that consideration and determination of the questions "so raised was necessary" to the decision of the Supreme Court of Oklahoma *as shown by the opinion of the Supreme Court of Oklahoma* filed on February 2, 1943.

That petitioner in its "Petition for Rehearing and Brief in Support Thereof" again alleged errors raising constitutional questions and argued them in its petition for rehearing and that *by denying said petition for rehearing* the Supreme Court of Oklahoma decided said questions "adversely to the contentions" of the petitioner.

This certificate, when properly analyzed, says nothing except that these constitutional questions were included in protestant's first amended and supplemental petition and were decided against protestant *as shown by the opinion of*

the Supreme Court of Oklahoma and were again decided against petitioner by the denial by the Supreme Court of Oklahoma of petitioner's "Petition for Rehearing." There is nothing in this certificate which discloses that the decision of these federal questions was necessary to the determination of the cause by the Supreme Court of Oklahoma; that they were actually decided by that court, or that the judgment as rendered could not have been given without deciding them.

The determination of whether a federal question was necessarily passed upon by the state court, or whether its decision of that question was necessary to the determination of the cause must rest upon an examination of the record. A certificate or statement of the state court is not controlling; that question is itself a federal question, which must be determined by this court. *Honeyman* v. *Hanan,* 300 U. S. 14-26, 81 L. ed. 476, the pertinent portion of the opinion reads:

> "Before we may undertake to review a decision of the court of a state *it must appear affirmatively from the record,* not only that the federal question was presented for decision to the highest court of the state having jurisdiction but that its decision of the federal question was necessary to the determination of the cause. *Lynch* v. *New York,* 293 U. S. 52, 54, 79 L. ed. 191, 192, 55 S. Ct. 16, and cases there cited. *Whether these requirements have been met is itself a federal question.* As this court must decide whether it has jurisdiction in a particular case, this court must determine whether the federal question was necessarily passed upon by the state court. That determination must rest upon an examination of the record. *A certificate or statement by the state court that a federal question has been presented to it and necessarily passed upon is not controlling. While such a certificate or statement may aid this court in the examination of the record, it cannot avail to foreclose the inquiry which it*

is our duty to make or to import into the record a federal question which otherwise the record wholly fails to present.''

For the reasons above stated, we respectfully submit that it does not affirmatively appear from the record in this case that a decision of a federal question was necessary to the determination of this cause; that such federal question was actually decided or that the judgment as rendered by the Supreme Court of Oklahoma could not have been given without deciding it.

For these reasons the petition for writ of *certiorari* should be denied.

Respectfully submitted,

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